

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONRAD CASTILLO,

Petitioner,

v.

MARTIN GAMBOA,

Respondent.

Case No. 1:24-cv-01521-SAB-HC

ORDER TO SHOW CAUSE WHY
PETITION SHOULD NOT BE DISMISSED
FOR FAILURE TO EXHAUST STATE
JUDICIAL REMEDIES

Petitioner, represented by counsel, is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it “plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

A petitioner in state custody who is proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state’s alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by

1 providing the highest state court with a full and fair opportunity to consider each claim before
2 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
3 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

4 If Petitioner has not sought relief in the California Supreme Court, the Court cannot
5 proceed to the merits of his claims. 28 U.S.C. § 2254(b)(1). The Court must dismiss without
6 prejudice a “mixed” petition containing both exhausted and unexhausted claims to give a
7 petitioner an opportunity to exhaust the claims if he can do so. See Lundy, 455 U.S. at 522.
8 However, a petitioner may, at his option, withdraw the unexhausted claims and go forward with
9 the exhausted claims. See Anthony v. Cambra, 236 F.3d 568, 574 (9th Cir. 2000) (“[D]istrict
10 courts must provide habeas litigants with the opportunity to amend their mixed petitions by
11 striking unexhausted claims as an alternative to suffering dismissal.”).¹ A petitioner may also
12 move to withdraw the entire petition and return to federal court when he has finally exhausted his
13 state court remedies.² Additionally, a petitioner may also move to stay and hold in abeyance the
14 petition while he exhausts his claims in state court. See Rhines v. Weber, 544 U.S. 269, 277
15 (2005); Kelly v. Small, 315 F.3d 1063, 1070–71 (9th Cir. 2002).

16 The instant petition raises three claims for relief. (ECF No 1 at 11–13.³) The petition
17 states that “Petitioner raised claims one and two in the California Court of Appeal and the
18 California Supreme Court,” but he “has not yet exhausted claim three.” (ECF No. 1-1 at 12.) The
19 petition states: “Along with the instant petition, Petitioner files an application for a stay pursuant
20 to Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), while he exhausts his remedies in state court
21 with respect to claim three.” (ECF No. 1-1 at 12.) However, no separate motion to stay has been
22 filed.

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25 ¹ The Court notes that “prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so
26 risks subjecting later petitions that raise new claims to rigorous procedural obstacles,” such as the bar against second
or successive petitions. Burton v. Stewart, 549 U.S. 147, 154 (2007).

27 ² Although the limitations period tolls while a properly filed request for collateral review is pending in state court,
28 U.S.C. § 2244(d)(2), it does not toll for the time a federal habeas petition is pending in federal court. Duncan v.
Walker, 533 U.S. 167, 181–82 (2001).

³ Page numbers refer to the ECF pagination stamped at the top of the page.

1 Accordingly, Petitioner is ORDERED to SHOW CAUSE within **THIRTY (30) days**
2 from the date of service of this order why the petition should not be dismissed for failure to
3 exhaust state judicial remedies.

4 Petitioner is forewarned that failure to follow this order may result in a recommendation
5 for dismissal of the petition pursuant to Federal Rule of Civil Procedure 41(b) (a petitioner's
6 failure to prosecute or to comply with a court order may result in a dismissal of the action).

7
8 IT IS SO ORDERED.

9 Dated: **January 15, 2025**



STANLEY A. BOONE
United States Magistrate Judge